Supreme Court, U.S.
FILED

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No. 02-

IN THE

Supreme Court of the United States

W. HAROLD SELLERS,

Petitioner,

v.

E.V. CHANDLER, Warden, Custodian of Mr. Sellers, United States Bureau of Prisons, Federal Prison Camp, Beaumont, Texas; RONALD G. THOMPSON, South Central Regional Administrator, United States Bureau of Prisons,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

Whether the Fifth Circuit erred in determining Petitioner did not fall within the savings clause codified in 28 U.S.C. § 2255, as interpreted in *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001), and in determining Petitioner had an opportunity to avail himself of this Court's decision in *Neder v. United States*, when *Neder* was decided after Petitioner's Section 2255 motion was denied.

Whether the Fifth Circuit erred in holding Petitioner's Constitutional rights were not violated when he was convicted and incarcerated under an indictment that failed to include all essential and material elements of the statutes he was punished for violating.

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Petitioner, W. Harold Sellers, respectfully prays that a Writ of Certiorari issue to review the decision of the Fifth Circuit in this case.

OPINIONS BELOW

The July 30, 2002, opinion of the Fifth Circuit is unreported and is reproduced at Appendix ("App.") B hereto at 3a-4a. The June 29, 2001, Memorandum Opinion of the district court denying Petitioner's Motion under 28 U.S.C. § 2255 in the Eastern District of Texas is unreported and reproduced at Appendix C hereto at 5a.

GROUNDS FOR JURISDICTION

The judgment of the Fifth Circuit was issued on July 30, 2002. Petitioner filed a Motion for Rehearing, which was denied on September 17, 2002. (App. A at 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution, which provides in relevant part that "no person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

28 U.S.C. §§ 2241, 2255.

STATEMENT OF THE CASE

Petitioner was a practicing lawyer in Houston, Texas, for about forty (40) years with an unblemished record. He was indicted by a federal grand jury on August 13, 1993, in the Eastern District of Louisiana. Petitioner was convicted on a third superseding indictment on one count of conspiracy, two counts of bank fraud, two counts of false statement, and eight counts of money laundering. The counts involved: Count 1, Conspiracy, in violation of 18 U.S.C. § 371; Counts 2 and 3, Bank Fraud, in violation of 18 U.S.C. § 1344; Counts 4, 5 and 6, False Statement, in violation of 18 U.S.C. §§ 1014 and 2; Counts 7-15, Money-Laundering, in violation of 18 U.S.C. §§ 1957 and 2; and Count 16, Criminal Forfeiture of Laundered Funds. All counts are based on purported fraud and intent to deceive as necessary elements of the charges alleged. Petitioner was acquitted of Count 5 and found guilty of the remaining counts. A copy of the third superseding indictment is being submitted herewith as a Lodging.

Petitioner appealed his convictions and sentences to the Fifth Circuit. On July 11, 1997, Petitioner's convictions were affirmed. *United States v. Dupre, et al.*, 117 F.3d 810, 825 (5th Cir. 1997).

Following his appeal, Petitioner filed a 28 U.S.C. § 2255 Motion in the Eastern District of Louisiana (the "trial court"). The trial court initially denied the § 2255 Motion on July 7, 1999 [Instrument No. 425]. At the end of its 1999 term, the United States Supreme Court decided in *Neder v. United States*, 527 U.S. 266, 119 S. Ct. 1827, 1841 (1999), *remanded to* 197 F.3d 1122 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 2717 (2000) which contained two significant holdings relevant

to this case: (i) that materiality is an essential element of bank fraud, *Id.* at 1841 (an interpretation of a substantive criminal statute); and (ii) the issue of materiality must be submitted to the jury, but the failure to do so may be analyzed with the harmless error test. *Id.* at 1834.

Because Petitioner had no opportunity to urge the substantive law change prior to the denial of the 2255 Motion, fifteen days later, on July 22, 1999, Petitioner sought reconsideration of the trial court's decision. Over the next two (2) months, Petitioner filed three (3) supplements to his motion for reconsideration.

Petitioner initially raised his objections to the defects in the indictment prior to his trial on February 7, 1994.

On November 9, 1999, Petitioner filed an application for certificate of appeal ability pursuant to 28 U.S.C. § 2253(c). The application specifically included the issues that were eventually certified by the trial court. In response to this Application, on November 16, 1999, the trial court issued an initial COA relating to the issue of "whether 'materiality' as an element of the offense had to be specifically decided by the jury."

On November 24, 1999, the trial court issued a second COA certifying the following issues for appeal by Petitioner:

(1) Whether Fifth Amendment rights were violated by the failure of the indictment to state every element of each offense, e.g. the failure to include "material" in counts 2 and 3; and

(2) Whether the improper instructions on "materiality" and the procedure by which they were decided by the trial court both as to false statements (§ 1014) and bank fraud (§ 1344) deprived defendants of due process.

On January 9, 2001, the Fifth Circuit issued its opinion. Regarding the first certified issue pertaining to the defective indictment, the Court held it did not have jurisdiction to consider this issue because the Petitioner's motion for reconsideration should have been considered a successive § 2255 petition under 28 U.S.C. § 2255. As such, the Panel determined that absent Petitioner's procurement of a COA from the Fifth Circuit, the Fifth Circuit and the district court lacked jurisdiction to consider the indictment issue for appeal.

On January 29, 2001, Petitioner filed a Petition for Rehearing En Banc, which was denied by the Fifth Circuit on February 20, 2001. The mandate and record on appeal were returned to the trial court on March 1, 2001.

Petitioner next filed a motion under 28 U.S.C. § 2241 in the Eastern District of Texas. On June 29, 2001, that motion was denied with the Eastern District Court holding that it had no jurisdiction because that matter should be considered as a successive § 2255 motion. The trial court ultimately concluded Petitioner failed to satisfy this circuit's test articulated in *United States v. Reyes-Requena*, 243 F.3d 893 (5th Cir. 2001), and dismissed the case.

Petitioner appealed to the Fifth Circuit, and the Fifth Circuit affirmed the decision of the Eastern District on July 30, 2002. [App. at 2a]. Petitioner filed a motion for rehearing, which was denied on September 17, 2002. [App. at 10a].

Petitioner was at the time of filing of the 28 U.S.C. § 2241 petition, incarcerated without authority or jurisdiction at F.P.C. Beaumont because he was convicted pursuant to a defective indictment that violated the Grand Jury Clause of the Fifth Amendment of the United States Constitution. Petitioner asserts that he is innocent of the crimes of which he has been charged and convicted and as a result he is challenging the manner in which his sentence is being executed.

REASONS FOR GRANTING THE PETITION

I.

THE DECISION OF THE FIFTH CIRCUIT AS IT RELATES TO THE SAVINGS CLAUSE OF 28 U.S.C. § 2255 SQUARELY CONFLICTS WITH DECISIONS OF THE SECOND, THIRD, AND SEVENTH CIRCUITS

A. PETITIONER MEETS THE AEDPA'S "SAFETY VALVE."

Normally, the AEDPA requires the individual to petition the court of appeals prior to filing a successive petition. However, recent cases make clear that when the 28 U.S.C. § 2255 remedy is "inadequate or ineffective" – as when a subsequent change in law raises serious constitutional implications as to whether the individual is rightfully incarcerated – the individual can seek § 2241 relief. *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001); *Triestman v. United States*, 124 F.3d 361, 377 (2d Cir. 1997) (finding § 2241 petition appropriate based upon law change after Appellant's unsuccessful § 2255 motion); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997).

In *Reyes-Requena*, the Fifth Circuit held that "the savings clause of § 2255 applies to a claim: (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense; and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion." *Id.* The Fifth Circuit further distilled these elements into: (i) retroactivity; and (ii) actual innocence. Ultimately, the Fifth Circuit determined that the district court erred in denying Reyes-Requena's § 2241 petition, and remanded the case to the district court to determine the substantive issues raised by Reyes-Requena's *Bailey* claims.

Here, the district court determined that Petitioner could not show actual innocence, and that he could likely not establish *Neder* was retroactive. [App. at 7a].

Petitioner falls squarely within the "safety valve" of § 2255. Petitioner is caught within the "unusual situation" discussed in these cases; namely, a subsequent change in law has indicated that the district court lacked jurisdiction to try Petitioner because he was improperly indicted.

Many other decisions besides *Reyes-Requena* bolster Petitioner's entitlement to the safety valve contained in § 2255. *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997); *In re Davenport*, 147 F.3d 605 (7th Cir. 1998); and *Lee v. Wetzel*, 49 F. Supp. 2d 875-878 (E.D. La. 1999), *vacated on other grounds*, 2001 WL 22466 (5th Cir. March 7, 2001).

Dorsainvil, *Triestman*, *Davenport*, and *Lee*, each in their own cases, were convicted for use of a firearm in the commission of a drug offense, 18 U.S.C. § 924(c). Then, the

Supreme Court decided *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501 (1995), holding that "use" in section 924(c) does not include mere possession of a firearm as had been the law of their circuits when defendants were convicted. Effectively, the defendants were found guilty of a crime that no longer existed.

In 1997, the Third Circuit in *Dorsainvil* set the pattern for the AEDPA's safety valve:

> Were no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent as a result of a previously unavailable statutory interpretation, we would be faced with a thorny constitutional issue. Dorsainvil argues, however, that there are a number of other avenues for relief, and proffers in addition to the writ of habeas corpus available under 28 U.S.C. Section(s) 2241, the writ of error coram nobis, the writ of audita querela and Rule 60(b) of the Federal Rules of Civil Procedure. We need not consider the litany of potential alternatives, because we conclude that, under narrow circumstances, a petitioner in Dorsainvil's uncommon situation may resort to the writ of habeas corpus codified under 28 U.S.C. Section(s) 2241.

In re Dorsainvil, 119 F.3d at 250. *Dorsainvil* went on to state:

> allowing someone in Dorsainvil's unusual position – that of a prisoner who had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may

> negate . . . is hardly likely to undermine the gate-keeping provisions of 2241 . . . The question before us is not whether Dorsainvil[1] is actually innocent of violating § 924(c)(1) but rather as in *Davis*, 417 U.S. at 347, whether his claim that he is being held for conduct that has subsequently been rendered non-criminal by an intervening Supreme Court decision is cognizable in a district court. . . . We cannot conclude that Dorsainvil has failed to present at least a sufficiently colorable claim based on *Bailey* for review under § 2241.

Id.

In *United States v. Hayman*, 342 U.S. 205, 222-23, 273-74, 72 S. Ct. 263 (1952), decided shortly after the enactment of § 2255, the Court considered the effect of the new provision on habeas corpus claims brought under § 2255. It confirmed the continued availability of the writ of habeas corpus. When the Section 2255 procedure is shown to be "inadequate or ineffective," under such circumstances, it need not reach constitutional questions. *Id.*

Triestman shed significant light on what Congress meant by "inadequate or ineffective" relief when it wrote:

> By construing the habeas-preserving paragraph of Section(s) 2255 to provide that habeas corpus remains available to federal prisoners when Section(s) 2255 is not available and when the failure to allow for some form of collateral review would raise serious constitutional questions, we do just that [construe a federal statute to avoid constitutional questions]. Specifically, in the case

> before us, we avoid deciding whether the AEDPA would be unconstitutional if it denied Triestman a judicial forum. And more generally, we encourage the district courts to continue to find that habeas corpus may be sought whenever situations arise in which a petitioner's inability to obtain collateral relief would raise serious questions as to Section(s) 2255's constitutionality.

Triestman, 124 F.3d at 377, 380.

Triestman recognized that any attempt by Congress to preclude all collateral review in a situation where relief under section 2255 was ineffective would raise serious questions as to the constitutional validity of the AEDPA's amendments to Section(s) 2255. In such circumstances, as are presented in the case sub judice, section 2255 is inadequate and ineffective to test the legality of Petitioner's detention. As was the case in *Triestman*, Petitioner is entitled to bring a petition for a writ of habeas corpus in the district court pursuant to Section(s) 2241(c)(3).

B. THE INTERVENING *NEDER* DECISION.

Petitioner filed his § 2255 Motion on February 5, 1999. The trial court initially denied the § 2255 Motion on July 7, 1999. At the end of its 1999 term, the United States Supreme Court decided in *Neder v. United States*, 527 U.S. 266, 119 S. Ct. 1827, 1841(1999), *remanded to* 197 F.3d 1122 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 2717 (2000) which contained two significant holdings relevant to this case: (i) that materiality is an essential element of bank fraud, *Id.* at 1841 (an interpretation of a substantive criminal statute); and (ii) the issue of materiality must be submitted

to the jury, but the failure to do so may be analyzed with the harmless error test. *Id.* at 1834. Because Petitioner had no opportunity to urge the substantive law change prior to the denial of the 2255 Motion, fifteen days later, on July 22, 1999, Petitioner sought reconsideration of the trial court's decision.

In Petitioner's case, the law in the Fifth Circuit was unsettled as to whether materiality was essential element of bank fraud at the time of trial and on appeal (all circuits were not in agreement.) *Neder*, decided after Petitioner's trial, appeal, and first section 2255 motion, made a substantive interpretation of a criminal statute and held that materiality *is an essential element* of bank fraud. *Neder*, 119 S. Ct. at 1841. This essential element was not charged in Petitioner's indictment and thus Petitioner has been found guilty of a crime that did not exist as charged in the indictment.

Petitioner meets the *Reyes-Requena* test. The district court erred in determining Petitioner's § 2241 petition did not fall within the AEDPA's safety valve.

C. *NEDER* IS RETROACTIVE.

Neder, like *Bailey*, involved the interpretation of a substantive criminal statute, and should therefore be retroactive on collateral review.[1] *United States v. McPhail*, 112 F.3d 197, 199 (5th Cir. 1997); *United States v. Andrade*, 83 F.3d 729 (5th Cir. 1996) at 730 n.1. In *McPhail*, the Fifth Circuit confirmed that *Bailey* was retroactive on collateral review. *McPhail*, 112 F.3d. 197, 199. In this regard,

1. It appears the Fifth Circuit has not determined whether *Neder* should be afforded retroactive application to cases on collateral review.

Neder and *Bailey* are identical, as both articulate the substantive elements the government must prove to convict a person under 18 U.S.C. §§ 1344 and 924(c)(1), respectively.

The Supreme Court in *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604 (1998), made clear that the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), did not bar consideration of a *Bailey* claim on collateral review: "[B]ecause *Teague* by its terms applies only to procedural rules, we think it is inapplicable to a situation in which this Court decides the meaning of a criminal statute enacted by Congress." *Bousley*, 523 U.S. at 620, 118 S. Ct. at 1604. Similarly, *Neder* is not subject to the restrictive *Teague* analysis.

Neder should be afforded retroactive application here. Under *Neder*, the Supreme Court analyzed a criminal statute enacted by Congress, and determined that materiality was an element of the count, and an issue for the jury. *Neder* made two significant holdings: (i) one procedural; and (ii) one substantive. The procedural decision, although not a watershed rule, required the issue of materiality to henceforth be submitted to the jury (rather than decided by the Court). The substantive decision dealt with the interpretation of a substantive criminal statute holding that, henceforth, materiality is an essential element of bank fraud.

Subsequent to Petitioner's trial, appeal and first § 2255 motion, the Supreme Court decided *Neder*, *supra*, which changed the law of the bank fraud statute § 1344, to make *materiality* an essential element (thus requiring this essential element to be contained in Petitioner's indictment). To this end, *Neder* is distinguishable from *United States v. Gaudin*, which only related to whether the court or jury should determine materiality.

The district court and the Fifth Circuit erred in determining that Petitioner could not show *Neder* should be retroactively applied to collateral appeals.

D. PETITIONER IS INNOCENT OF THE CHARGED OFFENSES.

Petitioner contends that in light of *Neder* he was not guilty. Similar to the situation in *Reyes-Requena*, or any of the numerous post-*Bailey* decisions allowing § 2241 petitions, Petitioner here was incarcerated for non-existent offenses. Simply put, the omission of "materiality" from the various indictment counts rendered the indictment a nullity.

Petitioner believes this brings this issue down to a simple question: Was *Neder's* interpretation of a criminal statute, 18 U.S.C. § 1344, such that Petitioner was convicted of a "non-existent offense" as required by *Reyes-Requena*'s actual innocence prong?

Bailey held that the term "use" required the active employment of the firearm by the defendant. *Bailey*, 516 U.S. at 144, 116 S. Ct. 501. Because facts showed *Bailey* did not "use" the firearm, he was convicted of conduct that did not constitute a crime. *Id.* Petitioner similarly relies upon the Supreme Court's interpretation of *Neder* that "materiality" is an essential element of bank fraud. Since he was not indicted for "material" fraud in the charge, he could not be found guilty of conduct that constitutes a crime.

Thus, in this sense, "materiality" in 18 U.S.C. § 1344 is the same as "use" in 18 U.S.C. § 941(c)(1). There was no "use" by Reyes-Requena and thus he was actually innocent because he was convicted for conduct that did not constitute

a crime. Except for nomenclature, Petitioner is in the almost identical situation as Reyes-Requena. There was no "materiality" charged in Petitioner's crime and thus he was actually innocent because he was convicted for conduct that did not constitute a crime.

Petitioner meets the *Reyes-Requena* standard. *Neder* should be retroactively applied to collateral appeals. Because Petitioner was not charged in his indictment with the essential element of materiality, which was not contained within the statute, he is actually and legally innocent of the crime charged.

E. AEDPA CANNOT "TRUMP" PETITIONER'S FIFTH AMENDMENT RIGHT TO ONLY BE TRIED ON CRIMES FOR WHICH HE WAS INDICTED BY A GRAND JURY.

As argued at length, *infra*, Petitioner contends his indictment lacked critical elements of the counts for which he was convicted and incarcerated. Notwithstanding Petitioner's satisfaction of *Reyes-Requena* and the AEDPA's safety valve, Petitioner does not believe that Congress, through the application of the AEDPA, could legislate away the right of all citizens to be properly indicted by a grand jury prior to trial and punishment.

This Court held in *United States v. Cotton*, __U.S. __, 122 S. Ct. 1781 (2002),

> 'an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form,' But in each of these cases proper objection had been made in the

> District Court to the sufficiency of the indictment. We need not retreat from this settled proposition of law decided in *Bain* to say that the analysis of that issue in terms of 'jurisdiction' was mistaken in the light of later cases such as *Lamar* and *Williams*. Insofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled.

Petitioner did object to the indictment. Petitioner submits that error occurred under the *Cotton* test, and the opinion of the Fifth Circuit should be reversed.

F. THE DECISION OF THE FIFTH CIRCUIT ERRED IN HOLDING PETITIONER DID NOT FALL WITHIN THE SAVINGS CLAUSE OF 28 U.S.C. § 2255.

The Per Curiam Opinion of the Fifth Circuit dated July 30, 2002, held "Sellers cannot show that his challenge to the indictment was foreclosed at the time of his first 28 U.S.C. § 2255 motion . . . Sellers had ample opportunity to raise this claim prior to the denial of that motion." [App. at 2a].

Petitioner respectfully urges this Court to consider the chronology of the case. Following his appeal, Petitioner filed a 28 U.S.C. § 2255 Motion in the Eastern District of Louisiana (the "trial court"). The trial court initially denied the § 2255 Motion on July 7, 1999. On June 17, 1999, the United States Supreme Court decided in *Neder v. United States*, 527 U.S. 266, 119 S. Ct. 1827, 1841 (1999), *remanded to* 197 F.3d 1122 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 2717 (2000).

Because Petitioner had no opportunity to urge the substantive law change prior to the denial of the 2255 Motion, fifteen days later, on July 22, 1999, he sought reconsideration of the trial court's decision.

The history of the case and the significant dates expressly disprove the conclusion that Petitioner had *any* opportunity to raise his jurisdictional claim prior to the denial of the first 2255 motion. The publication of *Neder v. United States* had not been accomplished prior to such denial of the motion.

Petitioner has never had a Court, trial or appellate, rule on the substance of his claim – that he was denied a fair trial because essential elements, specifically, materiality, were not contained in his indictment, thus not considered by the grand jury and therefore not considered by the petit jury.

Each of the rulings since his first 2255 motion have all been procedural and have avoided addressing this constitutional question. Petitioner meets this Court's test for utilizing § 2241 as a "safety valve" under the AEDPA. The intervening Supreme Court decision in *United States v. Neder*, which should be retroactively applied, established that materiality is an element of bank fraud. Petitioner's indictment did not include materiality as an element of bank fraud.

II.

THE DECISION OF THE FIFTH CIRCUIT AS IT RELATES TO THE DEFECTIVE INDICTMENT PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW

Neder confirmed that "materiality" is an essential element of the crimes for which Petitioner is currently imprisoned. His conviction should be reversed because his indictment failed to allege the "materiality" element. In turn, the bank fraud conviction was the foundation for his conviction of conspiracy (count 1), bank fraud (counts 2 and 3), money laundering (counts 7-15), and forfeiture (count 16). Thus, the bank fraud issues ultimately is dispositive of most, if not all, of Petitioner's convictions in this case.

Summarizing, the essential elements that were excluded from Petitioner's indictment are as follows:

1. Materiality was not charged as an element of the bank fraud counts under 18 U.S.C. § 1344;

2. Mens Rea – willful specific intent to deceive was excluded;

3. None of the five elements of aiding and abetting were charged under 18 U.S.C. § 2;

4. No Overt Acts were contained in the charging language relating to the conspiracy counts;

Petitioner contended in his direct appeal that the entirety of all proceedings to date in this case were conducted without jurisdiction and thus, void and a nullity *ab initio*. *See Johnson*

v. Zerbst, 304 U.S. 458 (1938); *Stirone v. United States*, 361 U.S. 212 (1961); *United States v. Cabrera-Teran*, 168 F.3d 141 (5th Cir. 1999). Even if the omission of the material elements is no longer jurisdictional under *Cotton*, Petitioner suffered error as a result.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 17, 2002

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-40787

ON PETITION FOR REHEARING

W HAROLD SELLERS,

Petitioner - Appellant,

VERSUS

E V CHANDLER, Warden, Custodian of Mr Sellers, United States Bureau of Prisons, Federal Prison Camp, Beaumont, Texas; RONALD G THOMPSON, South Central Regional Administrator, United States Bureau of Prisons,

Respondents - Appellees.

Appeals from the United States District Court
For the Eastern District of Texas, Beaumont

Before JOLLY, HIGGINBOTHAM, and PARKER,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

Appendix A

ENTERED FOR THE COURT:

/s/ Robert M. Parker
ROBERT M. PARKER
UNITED STATES CIRCUIT JUDGE

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JULY 30, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-40787
Summary Calendar

W. HAROLD SELLERS,

Petitioner-Appellant,

versus

E.V. CHANDLER, Warden, Custodian of Mr. Sellers, United States Bureau of Prisons, Federal Prison Camp; Beaumont, Texas; RONALD G. THOMPSON, South Central Regional Administrator, United States Bureau of Prisons,

Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:01-CV-177

Before JOLLY, HIGGINBOTHAM and PARKER, Circuit Judges.

PER CURIAM:*

W. Harold Sellers appeals from the denial of his 28 U.S.C. § 2241 petition. He argues that the district court

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

erred in determining that his challenge to the indictment in light of *Neder v. United States*, 527 U.S. 1, 20 (1999), did not meet the criteria for bringing a claim pursuant to the "savings clause" of 28 U.S.C. § 2255.

"[T]he savings clause of § 2255 applies to a claim (i) that is based on a retroactively applicable Supreme Court decision which established that the petitioner may have been convicted of a nonexistent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion." *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001).

We pretermit the issue whether *Neder* is retroactively applicable to cases on collateral review, because Sellers cannot show that his challenge to the indictment was foreclosed at the time of his first 28 U.S.C. § 2255 motion. As this court previously noted, Sellers had ample opportunity to raise this claim prior the denial of that motion. He therefore has not shown that the district court erred in dismissing his petition, and the judgement of the district court is AFFIRMED.

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION DATED AND FILED JUNE 29, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. 1:01cv177

W. HAROLD SELLERS

VS.

E.V. CHANDLER, ET AL.

MEMORANDUM OPINION

Petitioner W. Harold Sellers, an inmate confined in the Federal Correctional Complex in Beaumont, Texas, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

Factual Background and Procedural History

On August 13, 1993, petitioner was indicted by a federal grand jury in the Eastern District of Louisiana. Petitioner was convicted on a third superseding indictment on one count of conspiracy, two counts of bank fraud, two counts of false statement, and eight counts of money laundering. The counts involved: Count 1, Conspiracy, in violation of 18 U.S.C. § 371; Counts 2 and 3, Bank Fraud, in violation of 18 U.S.C. § 1344; Counts 4, 5, and 6, False Statement, in violation of

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18 U.S.C. § 1014 and 2; Counts 7-15, Money-Laundering, in violation of 18 U.S.C. § 1957 and 2; and Count 16, Criminal Forfeiture of Laundered Funds. All counts are based on purported fraud and intent to deceive as necessary elements of the charges alleged. Petitioner was acquitted of Count 5 and found guilty of the remaining counts.

Petitioner appealed his convictions and sentences to the Fifth Circuit Court of Appeals. On July 11, 1997, petitioner's convictions were affirmed on all counts. *United States v. Dupre*, 117 F.3d 810, 825 (5th Cir. 1997). However, petitioner's sentence was remanded for reconsideration of his restitution order and the government's proposal to enhance petitioner's sentence for obstruction of justice. *Id.*

Following his appeal, petitioner filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. The motion was denied on July 7, 1999. *Sellers v. United States*, No. 2:99cv428 (E.D. La. July 7, 1999). Petitioner appealed the denial of his motion to vacate sentence to the Fifth Circuit Court of Appeals. The judgment of the district court was affirmed on January 9, 2001. *United States v. Dupre*, No. 99-31294 (5th Cir. Jan. 9, 2001) (unpublished).

Additionally, petitioner previously filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in this court. The action was dismissed on November 19, 1999. *Sellers v. Chandler*, No. 1:99cv687 (E.D. Tex. Nov. 19, 1999).

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The Petition

Petitioner brings this petition asserting that an essential element of bank fraud, materiality, was not charged in the indictment, in violation of the Fifth Amendment. Petitioner argues that he was therefore found guilty of a crime that did not exist as charged in the indictment. In support of his claim for relief, petitioner relies on, *inter alia*, the recent Supreme Court decisions in *Neder v. United States*, 527 U.S. 266 (1999) and *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

Analysis

Petitioner is not challenging the manner in which his sentence is being executed. Instead, he attacks the legality of his convictions. Section 2255 provides the primary means of collaterally attacking a federal conviction and sentence. *Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000) . Relief under this section is warranted for errors that occurred at trial or sentencing. *Cox v. Warden, Fed. Detention Ctr.*, 911 F.2d 1111, 1113 (5th Cir. 1990).

Section 2241 is correctly used to attack the manner in which a sentence is executed. *Tolliver*, 211 F.3d at 877. A petition filed under § 2241 which attacks errors that occurred at trial or sentencing is properly construed as a § 2255 motion. *Id.* at 877-78. However, there is one exception to this general rule. A prisoner may use Section 2241 as the vehicle for attacking the conviction if it appears that the remedy by motion "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255.

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As petitioner attacks the legality of his convictions, his petition should be construed as a motion to vacate, set aside or correct sentence. However, the Antiterrorism and Effective Death Penalty Act (AEDPA), which became effective on April 24, 1996, amended 28 U.S.C. § 2255 by imposing a one-year statute of limitations for the filing of a motion to vacate sentence, as well as requirements for bringing successive motions. As petitioner has previously filed a motion to vacate sentence, he is barred from bringing another motion to vacate sentence, absent permission from the Fifth Circuit Court of Appeals which petitioner has not obtained. Petitioner, however, is attempting to bring this action as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, asserting that § 2255 is inadequate in his situation.

A petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 is not a substitute for a motion to vacate sentence pursuant to 28 U.S.C. § 2255, and the burden of coming forward with evidence to show the inadequacy or ineffectiveness of a motion under § 2255 rests squarely on the petitioner. *Jeffers v. Chandler*, __ F.3d __, 2001 WL 636814 (5th Cir. June 8, 2001); *McGhee v. Hanberry*, 604 F.2d 9, 10 (5th Cir. 1979). A prior unsuccessful § 2255 motion, or the inability to meet AEDPA's "second or successive" requirement, does not make § 2255 inadequate or ineffective. *Tolliver*, 211 F.3d at 878.

The United States Court of Appeals for the Fifth Circuit has recently set forth the factors that must be satisfied for a petitioner to file a § 2241 petition in connection with § 2255's savings clause. *See Reyes-Requena v. United States*, 243 F.3d 893 (5th Cir. 2001). In *Reyes-Requena*, the Fifth Circuit held

that "the savings clause of § 2255 applies to a claim (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion." *Id.* at 904.

Here, petitioner asserts that, since materiality was not charged in the indictment, he was found guilty of a crime that did not exist as charged in the indictment. However, petitioner's assertion does not amount to a claim that he was convicted of "a nonexistent offense" as required by the actual innocence prong of *Reyes-Requena*. Petitioner's claim is analogous to an *Apprendi* claim that the quantity of drugs must be stated in the indictment and submitted to a jury for a finding of proof beyond a reasonable doubt. *See United States v. Doggett*, 230 F.3d 160 (5th Cir. 2000). Petitioner's claim is not like a Bailey claim in which the conduct for which the defendant was convicted no longer constitutes a crime. *See Bailey v. United States*, 516 U.S. 137 (1995) . Thus, petitioner's claim must fail.

Further, petitioner has previously made the contention that his Fifth Amendment rights were violated because the indictment failed to state every element of each offense and that his convictions were constitutionally unfair because the district court failed to submit materiality to the jury on his bank fraud and false-statement offenses. This argument was asserted in petitioner's third supplement to the motion for reconsideration of the denial of his motion to vacate sentence. On appeal, the Fifth Circuit Court of Appeals ruled that

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"[t]he district court should have treated the third supplement to the motion for reconsideration attacking the validity of the appellant's convictions as a successive § 2255 motion." *Dupre*, No. 99-31294 at *2. Despite the Fifth Circuit's clarification as to how petitioner's argument should have been treated, petitioner does not assert that he has filed a motion with the Fifth Circuit seeking an order authorizing the United States District Court for the Eastern District of Louisiana to consider a successive 28 U.S.C. § 2255 motion. In fact, it appears that petitioner would be unable to satisfy the requirement for such authorization because the Supreme Court has not made the rulings in *Neder* and *Apprendi* retroactive to cases on collateral review, as required by 28 U.S.C. § 2255. However, as previously stated, the inability to meet AEDPA's "second or successive" requirement, does not make § 2255 inadequate or ineffective. *Tolliver*, 211 F.3d at 878. Accordingly, petitioner does not meet the criteria required to support a claim under the savings clause of § 2255. Thus, the petition should be dismissed.

Conclusion

For the reasons set forth above, this petition for writ of habeas corpus will be dismissed. A Final Judgment shall be entered in accordance with this Memorandum Opinion.

SIGNED this 29th day of June, 2001.

s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT JUDGE